

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ANTHONY LAWSON : CIVIL ACTION
:
v. :
:
CONSOLIDATED RAIL CORPORATION : NO. 97-7206

M E M O R A N D U M

WALDMAN, J.

March 29, 1999

This action arises from plaintiff's attempt to revoke an election to participate in a Voluntary Separation Program ("VSP") instituted by defendant in 1996 as part of a plan to reduce its workforce. Plaintiff alleges that defendant broke a promise to permit him to rescind his election and asserted a claim for breach of contract in a complaint filed in the Court of Common Pleas of Philadelphia. Plaintiff seeks to compel defendant to accept his proffered rescission, to compensate him for the salary he would have received had his employment continued and to provide him with the more lucrative package of severance benefits which were subsequently made available as a result of the acquisition of defendant by CSX and Norfolk Southern. Defendant removed the action to this court on the basis of ERISA preemption. Presently before the court is defendant's motion for summary judgment.

In considering a motion for summary judgment, the court must determine whether "the pleadings, depositions, answers to

interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986); Arnold Pontiac-GMC, Inc. v. General Motors Corp., 786 F.2d 564, 568 (3d Cir. 1986). Only facts that may affect the outcome of a case are "material." Anderson, 477 U.S. at 248. All reasonable inferences from the record must be drawn in favor of the non-movant. Id. at 256.

Although the movant has the initial burden of demonstrating the absence of genuine issues of material fact, the non-movant must then establish the existence of each element on which it bears the burden of proof. J.F. Feeser, Inc. v. Serv-A-Portion, Inc., 909 F.2d 1524, 1531 (3d Cir. 1990) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986)), cert. denied, 499 U.S. 921 (1991). The non-moving party may not rest on his pleadings but must come forward with evidence from which a reasonable jury could return a verdict in his favor. Anderson, 479 U.S. at 248; Williams v. Borough of West Chester, 891 F.2d 458, 460 (3d Cir. 1989); Woods v. Bentsen, 889 F. Supp. 179, 184 (E.D. Pa. 1995).

From the evidence of record as uncontroverted or otherwise taken in a light most favorable to plaintiff, the pertinent facts are as follow.

Plaintiff began working for defendant in December 1980. On February 21, 1996, defendant's board of directors approved the creation of the VSP as an amendment to defendant's Supplemental Pension Plan, a pre-existing ERISA pension plan. The VSP offered to each eligible employee benefit payments in exchange for his agreement voluntarily to terminate his employment. A participating employee could choose between an immediate lifetime annuity with a surviving spouse benefit, a lifetime annuity with payment deferred to age 65 with a surviving spouse benefit, and a lump-sum payment. Plaintiff, a manager in defendant's Forest Products Division, was eligible for participation in the VSP.

On March 1, 1996, defendant mailed to its employees a booklet explaining the essential terms of the plan including eligibility requirements, computation of benefits and application procedures. The booklet stated that an employee would have seven days from the submission of an application to revoke an election to participate. Plaintiff received this booklet.

Plaintiff attended a meeting on April 16, 1996 at which Marianne Gregory, defendant's assistant vice president in charge of plaintiff's group, advised each employee present to apply for participation in the VSP as an insurance policy in case of layoffs. She stated that employees who applied would be allowed to rescind their applications in the event they were to retain their current positions or were offered another position by defendant.

Plaintiff submitted his application for the VSP on April 18, 1996. The application contained a general release which plaintiff signed and a clause specifying that the applicant had a seven day period in which to rescind the application. Defendant accepted plaintiff's application on April 26, 1996 and exercised its right under the plan to extend his separation date to April 30, 1997.

In October 1996 Ms. Gregory told plaintiff she had a position available for him and that he could stay if he filled out a rescission form. Plaintiff expressed his willingness to rescind and to keep working for defendant but did not file a rescission form at that time. Ron Bridges, an assistant vice president in charge of a different group, later offered a new position to plaintiff if he were to rescind his VSP application. Plaintiff agreed and began working in Mr. Bridges' department on December 18, 1996. That same day plaintiff signed a form to rescind his VSP application and submitted the form for signature and approval by defendant.¹

Mr. Bridges told plaintiff in January 1997 that defendant had accepted the rescission but was holding it and that it would be processed by April 1, 1997. In March of 1997, Mr. Bridges told plaintiff that his rescission paperwork had been

¹ The form provides: "The undersigned representative of Conrail and the undersigned employee mutually agree that the employee rescinds his or her 1996 Voluntary Separation Program Application" and contains blanks for signatures of both the employee requesting the revocation and a "Leadership Team Member."

signed. In fact, plaintiff's request for revocation had not been signed or approved. Plaintiff was advised on April 18, 1997 that defendant did not accept his offer to rescind and his employment was terminated on April 30, 1997. Pursuant to the VSP, defendant tendered and plaintiff accepted \$134,219.

Plaintiff claims that the oral assurances of Ms. Gregory and Mr. Bridges that he could revoke his participation in the VSP created an enforceable contract supported by the consideration of his continued employment "in positions not of his choosing."²

Defendant argues that plaintiff's claim is preempted by ERISA, is not cognizable under ERISA and is barred by the release. Plaintiff argues that the VSP is not an ERISA plan and that he has a viable state breach of contract claim.

A plan for awarding severance benefits is an ERISA plan if it identifies a potential class of participants and requires an administrative scheme. See Pane v. RCA Corp., 868 F.2d 631, 634 (3d Cir. 1989) (severance agreements constituted plan under ERISA). Plaintiff correctly notes that a lump-sum payment triggered by a one-time event which does not require an

² It is uncontroverted that plaintiff was an at-will employee and he does not further explain how his continued employment to the designated termination date after he elected to receive VSP benefits constituted consideration for the alleged oral contract.

administrative scheme does not rise to the level of a plan under ERISA. The VSP, however, provides participating employees with the option to receive delayed and ongoing benefits.

An employer's assumption of responsibility to pay benefits on an ongoing basis requires an administrative scheme to address the need for financial coordination and control created by "the periodic demands on its assets." Fort Halifax Packaging Co. v. Coyne, 482 U.S. 1, 14 (1987) (distinguishing ongoing payment of benefits from lump-sum payment); Shahid v. Ford Motor Co., 76 F.3d 1404, 1409 (6th Cir. 1996). See also Cvelbar v. CBI Illinois Inc., 106 F.3d 1368, 1376-77 (7th Cir. 1997) (agreement to pay severance benefits to employee for three years upon termination required administrative scheme); Williams v. Wright, 927 F.2d 1540, 1544-45 (11th Cir. 1991) (agreement to issue check each month until death of employee implicated ERISA).

In contrast, the cases relied upon by plaintiff involve the payment of benefits for only a short period without an ongoing need for financial coordination and control. See Velarde v. PACE Membership Warehouse, Inc., 105 F.3d 1313, 1315 (9th Cir. 1997) (payment of bonus of four weeks pay plus severance payment); Delaye v. Agripac, Inc., 39 F.3d 235, 236 (9th Cir. 1994) (promise to single executive of payment of fixed amount for twelve to twenty-four months); Fontenot v. NL Indus., 953 F.2d 960, 961 (5th Cir. 1992) (lump-sum payment plus three year

continuation of existing benefits); Krug v. Caltex Petroleum Corp., 864 F. Supp. 11, 13 (N.D. Tex. 1994) (one-time lump-sum payment made no periodic demands on company assets).

The defendant's VSP requires an administrative scheme to monitor the lifetime and delayed payments. It is an ERISA plan.³

The release executed by plaintiff with his VSP application discharged defendant from all liabilities, claims and causes of action relating in any way to his employment by CONRAIL and his participation in the VSP.

A waiver or release of claims is permissible under ERISA. See Lockheed Corp. v. Spink, 517 U.S. 882, 894-95 (1996). A waiver of ERISA claims is effective if entered into voluntarily and with knowledge of its terms.⁴ See Leavitt v. Northwestern

³ That plaintiff elected to receive a lump-sum payment does not change the nature of the VSP. A plan cannot be an ERISA plan as to some participants and not others. The overall implementation of the VSP required an administrative scheme.

⁴ There is a seven factor "totality of circumstances" test for waiver or release under ERISA. See Feret v. First Union Corp., 1999 WL 80374, *5 (E.D. Pa. Jan. 25, 1999); Cooper v. Borough of Wenonah, 977 F. Supp. 305, 317 (D.N.J. 1997). The factors are the clarity and specificity of the release language; the plaintiff's education and business experience; the amount of time the plaintiff had for deliberation before signing the release; whether plaintiff knew or should have known his rights upon execution of the release; whether the plaintiff was encouraged to seek, or in fact received, the benefit of counsel; whether there was an opportunity for negotiation of the terms of the agreement; and, whether the consideration given in exchange for the waiver and accepted by the employee exceeds the benefits to which the employee was already entitled by contract or law.

Bell Tel. Co., 921 F.2d 160, 162 (8th Cir. 1990); Feret v. First Union Corp., 1999 WL 80374, *5 (E.D. Pa. Jan. 25, 1999) Kaminski v. Corestates Fin. Corp., 1998 WL 800536, *3 (E.D. Pa. Nov. 18, 1998); Bennett v. Independence Blue Cross, 1993 WL 15603, *2 (E.D. Pa. Jan. 13, 1993). The individual contesting the enforceability of a release has the burden of proving it to be invalid. See Feret, 1999 WL 80374 at *5.

Plaintiff has not claimed his execution of the release was not knowingly and voluntary, and he has not challenged its enforceability. He merely states in a one sentence heading in his brief that the release does not bar his claim. What follows, however, is an argument about why plaintiff's breach of contract claim is not preempted by ERISA. Moreover, even if plaintiff's claim were not barred by the all encompassing scope of the release, he cannot sustain his claim.

The VSP informational booklet provided to employees states in pertinent part: "All employees have 7 days after signing and submitting the Application and General Release to reconsider and revoke their participation in the Voluntary Separation Program." Similarly, the VSP application that plaintiff signed states: "I have 7 days after I sign this document to reconsider and revoke this General Release and my participation in the Voluntary Separation Program will not become effective until the 7 day revocation period has expired." The

formal plan document itself does not provide any period during which an employee may revoke or rescind his election to participate.

Accepting that the booklet was effectively a summary plan description ("SPD") pursuant to 29 U.S.C. § 1022 and thus part of the plan documents, plaintiff still has no claim. See Jensen v. Sipco, Inc., 38 F.3d 945, 950, 952 (8th Cir. 1994) ("SPDs are considered part of the ERISA plan documents" and an "SPD provision prevails if it conflicts with a provision of the plan"), cert denied 514 U.S. 1050 (1995); Henglein v. Informal Plan for Plant Shutdown Benefits for Salaried Employees, 974 F.2d 391, 400 (3d Cir. 1992) (limitations clause contained in SPD was enforceable); Alday v. Container Corp. of America, 906 F.2d 660, 665 (11th Cir. 1990) (provision in SPD controlled over contrary informal communications). Plaintiff's attempt unilaterally to revoke his participation would be ineffective under the terms of the booklet or the less generous formal plan document which provides no opportunity to rescind. It is undisputed that plaintiff did not attempt to revoke within seven days of filing his VSP application.

Defendant correctly states that any oral promises made to plaintiff, whether or not supported by consideration, would be ineffective to modify the written terms of the plan. ERISA

provides that "every employee benefit plan shall be established and maintained pursuant to a written instrument." 29 U.S.C. § 1102(a)(3). Courts view this provision as akin to a statute of frauds and require that any agreement modifying the terms of an ERISA plan be reduced to writing. See Frahm v. Equitable Life Assur. Soc. of United States, 137 F.3d 955, 958 (7th Cir. 1998) (employer's oral promise of lifetime benefits unenforceable under ERISA as agreement was not reduced to signed writing); Epright v. Environmental Resources Management, Inc., 81 F.3d 335, 342 (3d Cir. 1996) (only written amendments can modify terms of plan); In re Unisys Corp. Retiree Medical Benefit "ERISA" Litigation, 58 F.3d 896, 901 (3d Cir. 1995) (rejecting bilateral contract claim based on oral promises in consideration of employee's early retirement where they conflicted with terms in summary plan description); Confer v. Custom Engineering Co., 952 F.2d 41, 43 (3d Cir. 1991) (speech by company president and posting of announcement on bulletin board insufficient to modify terms); Hozier v. Midwest Fasteners, Inc., 908 F.2d 1155, 1165 n.10 (3d Cir. 1990) (employer's post-formation oral promises cannot alter scope of entitlements created by plan). Plaintiff's failure to revoke within the allotted seven day period is fatal to his breach of contract claim.⁵

⁵ Even were the court sua sponte to recast plaintiff's claim as one for equitable estoppel, it could not be salvaged. See Frahm, 137 F.3d at 961 (one cannot reasonably rely on oral statements which contradict written plan materials he has in hand); In re Unisys, 58 F.3d at 907-08 (a plaintiff cannot establish reasonable reliance on misrepresentations concerning

(continued...)

Consistent with the foregoing, defendant's motion will be granted. An appropriate order will be entered.

⁵(...continued)
benefits which cannot be reconciled with terms of plan in question); Hachwalter v. Christie, 805 F.2d 956, 960 (11th Cir. 1986) ("doctrine of estoppel cannot be used to alter" rule precluding oral modification of plan terms).

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O R D E R

AND NOW, this day of March, 1999 upon
consideration of defendant's Motion for Summary Judgment (Doc.
#13) and plaintiff's response, consistent with the accompanying
memorandum, **IT IS HEREBY ORDERED** that said Motion is **GRANTED** and
accordingly **JUDGMENT is ENTERED** in the above action for the
defendant.

BY THE COURT:

JAY C. WALDMAN, J.